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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-872

JACK I. JOHNSON,

v.

BOARD OF APPEALS AND REVIEW

HERBERT W. PAXTON, JR.

v.

BOARD OF APPEALS AND REVIEW

## PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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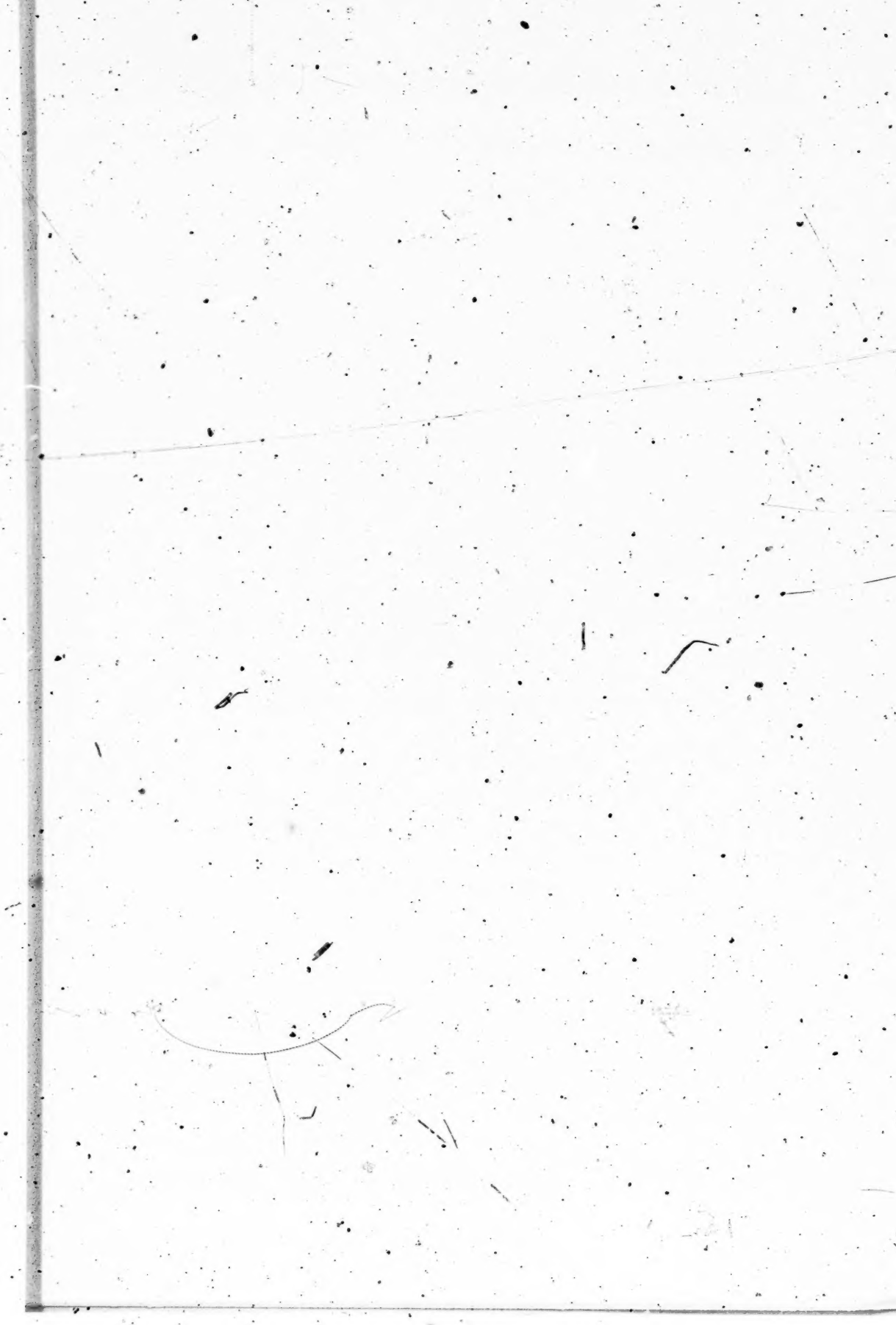

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### OPINION BELOW

The opinion below is reported at 282 A.2d 566.

### JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). The judgment of the District of Columbia Court of Appeals was entered on October 6, 1971.

## QUESTIONS PRESENTED

I. Whether the District of Columbia Court of Appeals erred in placing the burden of proof on the retiree in a proceeding before the Police and Firemen's Retirement Board to show that his disability was aggravated by the performance of duty.

II. Whether, if the burden of proof is on the Government to show that the retiree's disability was not aggravated by the performance of duty, the Petitioners should be retired for disability aggravated by the performance of duty.

## STATUTES INVOLVED

Title 4, District of Columbia Code, Section 521 (1) provides:

> "Wherever used in sections 4-521 to 4-535–
>
> (1) The term "member" means any officer or member of the Metropolitan Police force, of the Fire Department of the District of Columbia, of the United States Park Police force, of the White House Police force, and any officer or member of the United States Secret Service Division to whom sections 4-521 to 4-535 shall apply."

Title 4, District of Columbia Code, Section 526 provides:

> "Whenever any member coming under sections 4-521 and 4-535 completes five years of police or fire service and is found by the Commissioners to have become disabled due to injury received or disease contracted other than in the performance of duty, which disability precludes further service with his department, such member shall be retired on an annuity computed at the rate of 2 per centum of his basic salary at the time of retirement for each year or portion thereof of his service: *Provided*, That such annuity shall not exceed 70 per centum of his basic salary at time of retirement: *Provided further*, That the annuity of a member retiring under this section shall be at least 40 per centum of his basic salary at time of retirement."

Title 4, District of Columbia Code, Section 527 provides:

> "(1) Whenever any member is injured or contracts a disease in the performance of duty or such injury or disease is aggravated by such duty at any time after appointment and such injury or disease or aggravation permanently disables him for the performance of duty, he shall upon retirement for such disability, receive an annuity computed at the rate of 2 1/2 per centum of his basic salary at the time of retirement for each year or portion thereof of his service: *Provided*, That such annuity shall not exceed 70 per centum of his basic salary at the time of retirement, nor shall it be less than 66 2/3 per centum of his basic salary at the time of retirement.
>
> (2) In any case in which the proximate cause of an injury incurred or disease contracted by a member is doubtful, or is shown to be other than the performance of duty; and such injury or disease is shown to have been aggravated by the performance of duty to such an extent that the member is permanently disabled for the performance of duty, such disability shall be construed to have been incurred in the performance of duty. The member shall, upon retirement for such disability, receive an annuity computed at the rate of 2 1/2 per centum of his basic salary at the time of his retirement for each year or portion thereof of his service: *Provided*, That such annuity shall not exceed 70 per centum of his basic salary at the time of retirement, nor shall it be less than 66 2/3 per centum of his basic salary at the time of retirement."

## STATEMENT OF THE CASE

### A. The Proceedings Below

The Petitioners are former members of the United States Park Police. They were retired from the Park Police after hearings before the Police and Firemen's Retirement Board for disabilities not incurred in, nor aggravated by, the perfor

mance of duty. (J. Tr. 57; P. Tr. 57). The Petitioners appealed the Retirement Board's ruling to the Board of Appeals and Review which sustained the Retirement Board's ruling (J. Tr. 58-59, 99; P. Tr: 99).

Pursuant to the District of Columbia Administrative Procedure Act, (1 D.C. Code 1510 (1967 ed., Supp. IV, 1971))[1], the Petitioners appealed to the District of Columbia Court of Appeals. On October 6, 1971, the District of Columbia Court of Appeals affirmed the agency's orders.

### B. The Hearings Before the Retirement Board

1. *Petitioner Johnson.* The Petitioner, Jack Johnson, was born May 17, 1942, completed the 11th grade, served in the Navy from 1959 to 1963, and married in 1962 to a woman eleven years his senior, who had three children by a prior marriage. (Tr. 2, 8). His service in the Navy was without incident, and he was honorably discharged (Tr. 8). At the time of the hearing, his wife and children were in good health and his marital relations were good (Tr. 8). After serving briefly as a nurses' assistant at St. Elizabeths Hospital, he was appointed to the United States Park Police in October, 1963.

Johnson was psychiatrically tested prior to his appointment without adverse findings (Tr. 94). After the Civil Disturbance in 1968 in the District of Columbia, Johnson began to have difficulties performing his duties which soon

---

[1] The Petitioners were retired under the provisions of 4 D.C. Code 526 (1967 ed.) which provides for an annuity computed at the rate of 2% of the retiree's basic salary at the time of retirement for each year of service, the annuity to be no less than 40% nor greater than 70% of such salary. The Petitioners contended that they should have been retired under 4 D.C. Code 527 (2) for disabilities aggravated by the performance of duty which would have provided them with an annuity computed at the rate of 2 1/2% of their basic salary at the time of retirement for each year of service, the annuity to be no less than 66 2/3% nor greater than 70% of their salary.

led to a psychiatric evaluation. His reaction to his duty while assigned to Resurrection City was unusual. He became extremely upset. (Tr. 31-32). He could not cope with or reconcile what he believed to be tolerance for law breaking at Resurrection City with strict enforcement of the law for petty violations elsewhere. He reacted similarly when told by a superior to drop a drunk driving charge against a State Department official (Tr. 32).

On March 4, 1969, Johnson inadvertently placed the wrong date on a series of parking tickets for which he was severely chastised by his commanding officer in the presence of others (Tr. 40). The following day he went to the Police and Fire Clinic, and was sent to a psychiatric hospital for evaluation (Tr. 41). Johnson remained under psychiatric care until his retirement. He was diagnosed "personality trait disturbance in a passive aggressive personality with paranoid overtones." (Tr. 2) The psychologist's report stated that Johnson exhibited paranoid characteristics (Tr. 60, Dr. Hyman Shapiro, a qualified psychiatrist, reported that he diagnosed Johnson as having a "long standing personality disorder manifestations of a personality trait disturbance passive aggressive personality with apparent overtones." Dr. Shapiro reported that Johnson stands stress very poorly. (Tr. 9). And Dr. Shapiro further reported that he could find nothing in Johnson's private life that could have caused him to decompensate (Tr. 15-16). He attributed Johnson's difficulties to job tensions and pressures (Tr. 22-25).

2. *Petitioner Paxton.* The Petitioner, Herbert W. Paxton, Jr., was born September 18, 1922 and appointed to the United States Park Police on July 16, 1950 (Tr. 3). He served in the Navy in the early 1940's and was wounded in 1943 (Tr. 31). Paxton was first examined psychiatrically in November 1965, following an acquittal in court for involuntary manslaughter of a man he found in a car with his (Paxton's) wife (Tr. 4). He was found "in extremely good shape emotionally" and returned to duty (Tr. 4). He there-

after divorced his wife; received custody of his two sons, and married a second time in April, 1968 (Tr. 4, 41).

In the meantime in May, 1967, Paxton reported to the Police and Fire Clinic for psychiatric consultation (Tr. 4-5). He was referred to Dr. Hyman Shapiro and seen by Dr. Shapiro until August, 1967 (Tr. 41). Paxton received no psychiatric treatment from August, 1967 until September, 1968 when, while undergoing treatment for diarrhea, he was referred to a clinic psychiatrist at the request of an unknown superior officer (Tr. 30, 46, 55). Paxton was diagnosed as "mixed psychoneurotic reaction with features of anxiety, depression and paranoid ideation predominately" which caused his diability (Tr. 3). Dr. Randolph Frank, a qualified psychiatrist, testified that it was certainly possible that Paxton's condition was one where there was some relationship between his work and his disabling condition[2] (Tr. 22).

### C. The Opinion of the Court of Appeals

The court of appeals found that it had jurisdiction pursuant to the District of Columbia Administrative Procedure Act, 1 D.C. Code 1510 (1967 ed., Supp. IV, 1971). The court reviewed the evidence before the agency and wrote: "Petitioner's principal argument before this court is that the government failed to carry its burden, assertedly imposed by statute, of establishing that petitioners' disabilities did not result from the performance of duty." 282 A.2d at 569. The court held that under 4 D.C. Code 527 (2) the claimant or pensioner has the burden of proving that his pre-existing injury of disease was aggravated by the performance of duty. 282 A.2d 570. In doing so, the court sought to distinguish two cases decided by the United States Court of Appeals which held precisely the contrary: *Blohm v. Tobriner*, 350 F.2d 785, 122 U.S. App. D.C. 2 (1965), and

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[2]Paxton had expressed his belief that his commanding officer had threatened to get rid of him and that he was constantly being watched (Tr. 25-56, 32).

*Wingo v. Washington*, 393 F.2d 633, 129 U.S. App. D.C. 410 (1968). In *Blohm*, the court said, the retirement was under 4 D.C. Code 527 (1) which applied to instances in which the officer contracted a disease or suffered an injury in the performance of duty and thereafter aggravated the disease or injury in the performance of duty. 282 A.2d at 570. *Wingo*, the court said, could be distinguished similarly, although the officer involved was retired for a mental disorder as opposed to a physical injury. 282 A.2d at 570-571.

The court of appeals concluded that in any event, since the case was before it under the District of Columbia Administrative Procedure Act (1 D.C. Code 1510 (1967 ed., Supp. IV, 1971)), the Retirement Board's ruling should be affirmed if the findings are supported by "substantial evidence". 282 A.2d at 571. The court found that there was substantial evidence to support the Board's findings. 282 A.2d at 571.

## ARGUMENT

### I. THE COURT OF APPEALS ERRED IN PLACING THE BURDEN OF PROOF ON THE RETIREE IN A PROCEEDING BEFORE THE POLICE AND FIREMEN'S RETIREMENT BOARD TO SHOW THAT HIS DISABILITY WAS AGGRAVATED BY THE PERFORMANCE OF DUTY.

1. The Police and Firemen's Retirement and Disability Act (4 D.C. Code 521 *et seq.*) provides the rate of annuity for retirees from the United States Secret Service, the Executive Protective Service, the United States Park Police, and the Metropolitan Police Department. For members of the respective services who are disabled and retired due to an injury or disease not incurred in the performance of duty, the annuity is computed at the rate of 2% of the retiree's basic salary at the time of retirement for each year of service, the annuity to be no less than 40% nor greater than 70% of such salary. 4 D.C. Code 526 (1967 ed.). For members who are disabled and retired due to an injury or

disease incurred or aggravated in the performance of duty, the annuity is computed at the rate of 2 1/2% of the retiree's basic salary at the time of retirement for each year of service, the annuity to be no less than 66 2/3% nor greater than 70% of such salary. 4 D.C. Code 527(1)(1967 ed., Supp. IV, 1971). If the origin of the retiree's injury or disease is not known or is not in the performance of duty but nonetheless is aggravated by the performance of duty to the point that the retiree is disabled, he is to receive the rate established for retirees disabled in the performance of duty. 4 D.C. Code 527(2)(1967 ed., Supp. IV, 1971).

The District of Columbia Court of Appeals held below that under 4 D.C. Code 527(2)(1967 ed., Supp. IV, 1971) a retiree has the burden of proving his pre-existing condition was aggravated by the performance of duty. The court of appeal's decision is a marked departure from two prior cases decided by the United States Court of Appeals for the District of Columbia Circuit,[3] is directly contrary to the legislative history of the statute involved,[4] and creates the unique and unusual situation of having a court responsible for District of Columbia affairs chart a course which is unfavorable and adverse to a substantial number of federal employees, as well as to a substantial number of District of Columbia employees.

2. The Police and Firemen's Retirement Board administers the Police and Firemen's Retirement and Disability Act, (4 D.C. Code 521 *et seq.*). 1 D.C. Code, Appendix, Organization Order No. 12 (1967 ed., Supp. IV, 1971). Members of the United States Secret Service, the Executive Protective Service, the United States Park Police, as well as members of the Metropolitan Police Department, are covered by the Act so that the rules by which the Board conducts its proceedings affect a substantial number of Federal

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[3] *Blohm v. Tobriner*, 350 F.2d 785, 122 U.S. App. D.C. 2, (1965), *Wingo v. Washington*, 395 F.2d 633, 129 U.S. App. D.C. 410, (1968).

[4] 4 D.C. Code 527(2) (1967 ed., Supp. IV, 1971).

employees as well as District of Columbia employees. See 4 D.C. Code 521(1). Until the District of Columbia Administrative Procedure Act (1 D.C. Code 1510) (1967 ed., Supp IV, 1971)), and the District of Columbia Court Reorganization Act of 1970, P.L. 91-358, 84 Stat. 475-521 (July 29, 1970), the United States Court of Appeals for the District of Columbia Circuit had ultimate appellate jurisdiction in the District of Columbia in cases originating before the Police and Firemen's Retirement Board. And a body of law developed in the United States Court of Appeals which clearly placed the burden of proof on the Government in proceedings before the Retirement Board to show that a police officer incurred a disability *not* in the performance of duty and was thus entitled to an annuity at a rate less than he would receive if his disability was incurred in the performance of duty.

In *Blohm v. Tobriner*, 350 F.2d 785, 122 U.S. App. D.C. 2, 350 (1965), the police officer suffered a skull fracture in the performance of duty, recovered, and returned to duty. He thereafter developed headaches which caused him to lose time from work. The Police Department moved to force his retirement and directed him to appear before the Retirement Board which ordered his retirement for disability not incurred in the performance of duty. Referring to 4 D.C. Code 526 and 527(1), the United States Court of Appeals wrote (350 F.2d at 786, 122 U.S. App. D.C. at 3):

> Where it is the Police Department which initiates a proceeding to retire an officer against his will and for a disability which is alleged to be unrelated to his official service, the evidence of such lack of connection should clearly preponderate and be substantial and persuasive . . . . [T]he Department may be said to have failed to carry the burden fairly to be assigned to it under the statute. As appellant's history shows, policemen must of necessity engage in hazardous work as a part of their regular duties, and Congress has amply manifested a distaste for the resolution of doubts against them in the administration of laws passed for their protection. [Citations]

Subsequently, in *Wingo v. Washington*, 395 F.2d 633, 129 U.S. App. D.C. 410 (1968), an involuntary retirement for a mental disability in which the officer challenged the agency's finding that his disability was not aggravated by the performance of duty, the United States Court of Appeals expressly relied on *Blohm*, and remanded the case to the agency for action consistent with its opinion. Because the Retirement Board made no findings, the Court wrote (395 F.2d at 635-636, 129 U.S. App. D.C. at 412-413):

> We think that under *Blohm* the Government's view, that the police officer's disabling condition was not related to his service, must not only be supported by substantial and persuasive evidence, but findings of the Retirement Board setting forth the material facts.

After *Blohm* but prior to *Wingo*, the Police and Firemen's Retirement and Disability Act was amended to include 4 D.C. Code 527(2) which applies to instances where the origin of the officer's injury or disease is not known or is not related to the performance of duty but the injury or disease is "aggravated by the performance of duty" to the point that the officer is disabled. In recommending passage of this Amendment, the House Committee which considered the Amendment wrote (House Report No. 892, Amending The Policemen and Firemen's Retirement and Disability Act, to accompany H.R. 6836, 87th Cong., 1st Sess., August 10, 1961, at 1):

> The purpose of this legislation is to create an additional category of service-connected disability which will enable the member to retire if an injury or disease contracted other than exclusively in the performance of duty is so aggravated by the performance of duty as to disable the member from further duty, and to place the burden of proof on the Government that such duty did not aggravate the injury or disease contracted (it may or may not have been incurred or contracted in the performance of duty).
>
> Such legislation is comparable to and in keeping with industrial compensation procedures.

A member retiring under this proposed legislation will receive the same annuity as if there was no doubt of the disability having resulted exclusively in the performance of duty.

4. In placing the burden of proof on the retirees in the cases below, the District of Columbia Court of Appeals distinguished *Blohm* on the ground that the officer's pre-existing injury was in the performance of duty and, thus, the officer retired under a 4 D.C. 527(1). The court distinguished *Wingo* on the same ground, although it seems clear that *Wingo* was decided under 4 D.C. 527(2). The District of Columbia Court of Appeals did *not* consider the statute's legislative history—which, in our view, is dispositive of the issue—and totally ignored the maxim that workmen's compensation laws should be liberally construed in favor of the employee. What the lower court did was depart from precedent set by the United States Court of Appeals in an area affecting federal employees and chart a course that is inconsistent with the intent and purpose of the statute and is bound to have an unfavorable and adverse effect on a substantial number of members of the United States Secret Service, the Executive Protective Service, the United States Park Police, and the Metropolitan Police Department.

## II.

## IF THE BURDEN OF PROOF IS ON THE GOVERNMENT TO SHOW THAT THE RETIREE'S DISABILITY WAS NOT AGGRAVATED BY THE PERFORMANCE OF DUTY, THE PETITIONERS SHOULD BE RETIRED FOR DISABILITY AGGRAVATED BY THE PERFORMANCE OF DUTY.

The question as to who has the burden of proof in a retirement proceeding under the Police and Firemen's Retirement and Disability Act frequently determines the outcome of the proceeding. If the retiree's injury or disease might or could have been aggravated by the performance of duty, it is sufficient to qualify the retiree for the larger annuity. See *Sentilles v. Inter Caribbean Shipping Corp.*,

361 U.S. 107 (1959) (FELA case). Thus, for example, in Johnson's case, there was no history of psychiatric difficulty prior to his appointment to the United States Park Police (Tr. 94). He had a stable home and family life, and, as the psychiatrist reported, there was nothing in Johnson's private life that could have caused him to decompensate (Tr. 22-25). Similarly, in Paxton's case, there was no history of psychiatric difficulty prior to his appointment to the United States Park Police and Dr. Frank, a qualified psychiatrist, testified that it was certainly possible that Paxton's condition was one where there was some relationship between his work and his disabling condition (Tr. 22) Thus, if the Government had the burden to show that Johnson's and Paxton's conditions were not aggravated by the performance of duty, it would have failed in light of the evidence adduced at the hearing.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX I

## THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 5634

JACK I. JOHNSON, *Petitioner*

v.

BOARD OF APPEALS AND REVIEW, *Respondent*

No. 5635

HERBERT W. PAXTON, JR., *Petitioner*

v.

BOARD OF APPEALS AND REVIEW, *Respondent*

Decided October 6, 1971

Carleton U. Edwards, II, Washington, D.C., with whom Benjamin Greenspoon, Washington, D.C., was on the briefs, for petitioners.

Leo N. Gorman, Asst. Corp. Counsel, with whom C. Francis Murphy, Corp. Counsel, and Richard W. Barton, Asst. Corp. Counsel, were on the briefs, for respondent.

Before HOOD, Chief Judge, and KELLY and REILLY, Associate Judges.

REILLY, Associate Judge:

Petitioners are former members of the United States Park Service, retired after hearings before the Police and Firemen's Retirement Board (referred to herein as the "Retirement Board") for disabilities not incurred in, nor aggravated by,

the performance of duty. In the hearings before the Retirement Board, the officers did not deny that they were "disabled" (*i.e.*, no longer fit to perform duty), but contended that the disability had been caused or aggravated by service in the force.

Deeming themselves aggrieved by contrary findings,[1] petitioners thereafter appealed to the Board of Appeals and Review for the District of Columbia which, in separate orders, sustained the Retirement Board.

Petitioners have brought these orders to this court for review. Though argued separately, the cases are consolidated for the purpose of disposition because common questions of law are involved.

[1] Before proceeding to the substantive issues raised by petitioners, we first consider the question of our jurisdiction to review the matter—an issue raised by the Board of Appeals and Review. That section of the Code which provides for judicial review of decisions of agencies of the District of Columbia reads in pertinent part:

> Any person suffering a legal wrong, or adversely affected or aggrieved, by an order or decision of the Commissioner or Council or an agency in a contested case, is entitled to a judicial review thereof in accordance with this chapter upon filing in the District of Columbia Court of Appeals a written petition for review. * * *[2]

The Board of Appeals and Review contends that neither petition involves a "contested case" subject to our review,

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[1] D.C. Code 1967, §4-562, the section under which petitioners were retired, provides for an annuity computed at the rate of 2% of retiree's basic salary at the time of retirement for each year of service, the annuity to be no less than 40% nor greater than 70% of such salary. Petitioners contend that they should have been retired under §4-527, which provides for an annuity computed at the rate of 2 1/2% of basic salary at the time of retirement, the annuity to be no less than 66 2/3% nor greater than 60% thereof.

[2] D.C. Code 1967, §1-1510 (Supp. IV, 1971).

pointing out that such term is defined in the Code to exclude "the selection or tenure of an officer or employee of the District."[3] The Board argues that the term "tenure" should be interpreted to include "tenure of retirement," that is, the "manner or means of holding" retirement rights.

Respondent cites no authority, and we have been unable to find any, which extends the concept of tenure so drastically. The legislative history of the Act is certainly not helpful to respondent. The committee which reported this legislation to the House stated:

> The definiton of "contested case" has been drafted so as to exclude administrative functions traditionally nonsusceptible to application of the process of adjudication, such as inspections, tests, elections, etc., and where generally no hearing is expressly or implicitly required by any other law.[4]

A contested retirement case scarcely fits into this category. D.C. Code 1967, § 4-533 (Supp. IV, 1971), specifically requires that any officer under consideration for retirement under the chapter be afforded an opportunity to appear and give evidence.

This court's decision in Matala v. Washington, D.C. App., 276 A.2d 126 (1971), does not sustain respondent's position. There, a police officer was fined $700 by the Metropolitan Police Special Trial Board for official misconduct. When the case came before us on petition for review we dismissed for lack of jurisdiction. We attributed significance there to the fact that the same section of the Code authorizes fines, suspensions, and removals of police officers, and that all such measures serve the same purpose, viz., maintenance of discipline in the police force. We also emphasized that imposition of a fine was a less severe penalty than removal from the force—an action concededly not subject to judicial review.

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[3] D.C. Code 1967, § 1-1502(8) (B) (Supp. IV, 1971).

[4] H.Rpt. 202, 90th Cong., 1st Sess. 1967.

The same considerations do not apply here, for neither petitioner assets a right to remain on active duty, thereby limiting the issue to the type of disability allowance which the Retirement Board granted. To be sure, as the government points out, one of the stated purposes of the Administrative Procedure Act is to provide a uniform method for review of final determinations of any District agency but, in our opinion, such general language does not suggest that the issue of what kind of pension, if any, to which a public employee is entitled, is merely a facet of the right to obtain or retain public office.

Having decided that the decisions of the Retirement Board are not exempted from judicial review, we turn now to the objections raised by each petitioner in his particular case.

In No. 5634, petitioner Johnson contended at the hearing before the Retirement Board that his disease was caused or aggravated to the point of complete disability by his service with the Park Police, and in particular by certain experiences: to wit, (1) his duty during the 1968 riots and demonstrations, (2) having to drop an assault charge against a diplomat at the insistence of his commanding officer, and (3) being told in a "gruff" manner by his superior officer to go out and correct some 40 parking citations he had misdated earlier that day.

The Retirement Board found that Johnson suffered from "a personality trait disturbance in a passive aggressive personality, with paranoid overtones." The views of the Retirement Board were amplified by a member of that agency who defended the decision before the Board of Appeals and Review. He summarized the evidence in the record as pointing to a disturbance in early childhood with lifetime consequences, aggravating personal problems which ultimately became the cause of petitioner's breakdown. The Retirement Board concluded that it could find no incidents or duty related circumstances which would cause or aggravate his disabling condition. The Board of Appeals sustained.

Evidence in the record supports the Retirement Board's finding as to the nature of Johnson's condition, including oral testimony by a psychiatrist and written testimony by three other members of the medical profession. There seemed to be agreement also that Johnson's ultimately disabling condition was due to factors which existed prior to his service with the Park Police.

Paxton, petitioner in No. 5635, contended before the Retirement Board that his disability was caused by on-the-job pressures commencing in 1968. Paxton testified that he felt he was being persecuted by one of his superior officers, who, in order to establish grounds for dismissing him from the force, watched him constantly, refused to give credit for work done, and quibbled over minor discrepancies in his reports. The fact of Paxton's long and arduous hours of duty during the demonstrations and riots in 1968 were adduced as factors in his disability. His counsel also submitted that the detective work Paxton performed would tend naturally to aggravate his suspicious nature.

The Retirement Board found that Paxton was suffering from an "inferiority complex," otherwise described in the record as a "severe neurosis with features of tensions, anxiety and depression." There was some evidence indicating that this condition had its origin in childhood incidents and had been exacerbated in later life by traumatic off duty experience, including quarrels with his former wife, culminating in a fatal affray.[5] The Retirement Board concluded that there was no evidence connection Paxton's disability with his official service with the Park Police. The Board of Appeals upheld that conclusion.

[2,3] Petitioner's principal argument before this court is that the government failed to carry its burden, assertedly

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[5] Paxton was tried and acquitted on a charge of involuntary manslaughter in 1965. The indictment resulted from a confrontation with a man the officer found in a car with his wife. During an exchange of blows the man evidently fell against the car door and incurred a fatal head injury.

imposed by statute,[6] of establishing that petitioners' disabilities did not result from the performance of duty. We note that in neither hearing did petitioner contend before the Board that his basic disease—in No. 5634 "a passive aggressive personality with paranoid overtones"; in No. 5635 "severe neurosis with features of tensions, anxiety and depression"—was contracted in the performance of duty, a condition precedent to a service-connected disability annuity under the first subsection of §4-527 of the Code.[7] In both cases, however, petitioners assert that their diseases, no matter how incurred, were aggravated by the performance of duty to the point of disablement, and hence under the second subsection, they were entitled to such an annuity.

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[6]D.C. Code 1967 (Supp. IV, 1971).

§4-527. (1) Whenever any member is injured or contracts a disease in the performance of duty or such injury or disease is aggravated by such duty at any time after appointment and such injury or disease or aggravation permanently disables him for the performance of duty, he shall upon retirement for such disability, receive an annuity computed at the rate of 2 per centum of his basic salary at the time of retirement for each year or portion thereof of his service: *Provided*, That such annuity shall not exceed 70 per centum of his basic salary at the time of retirement, nor shall it be less than 66 2/3 per centum of his basic salary at the time of retirement.

(2) In any case in which the prosimate cause of an injury incurred or disease contracted by a member is doubtful, or is shown to be other than the performance of duty, and such injury or disease is shown to have been aggravated by the performance of duty to such an extent that the member is permanently disabled for the performance of duty, such disability shall be construed to have been incurred in the performance of duty. the member shall, upon retirement for such disability, receive an annuity computed at the rate of 2 per centum of his basic salary at the time of his retirement for each year or portion thereof of his service: *Provided*, That such annuity shall not exceed 70 per centum of his basic salary at the time of retirement, nor shall it be less than 66 2/3% per centum of his basic salary at the time of retirement.

[7]Quoted in full in n. 6, *supra*.

But the wording of §4-527(2) does not seem to sustain petitioners' position on the question of burden of proof. Even if we accept petitioners' premise that the original cause of their respective mental disorders is "doubtful", the second paragraph of the applicable section provides that an injury or disease must be "*shown* to have been aggravated by the performance of duty *to such an extent* that the member is permanently disabled for the performance of duty." (Emphasis supplied.) This language strongly suggests that it is up to the claimant, if original causation is obscure or concededly due to factors outside the service, to prove that his disease or injury was subsequently aggravated by events occurring in the line of duty.

Despite this language, petitioners argue that judicial construction of this section has established a rule to the contrary. They rely particularly on Blohm v. Tobriner, 122 U.S. App. D.C. 2, 350 F.2d 785 (1965), and Wingo v. Washington, 129 U.S. App. D.C. 410, 395 F.2d 633 (1968). At first blush, it does appear that certain observations in those opinions do lend support to petitioners' thesis. We have concluded; however, that neither decision, nor any of the others petitioners cited, is dispositive of the issues raised in the two cases before us.

In *Blohm*, a traffic officer was catapulted from his motorcycle in a collision which occurred in his pursuit of a speeding vehicle. He landed on his head, incurred a severe cerebral concussion which necessitated his being hospitalized for six months. Shortly after his return to duty he was bothered with recurring headaches and was ultimately involuntarily retired by the Board for disability not arising from the performance of duty.

In vacating this order, the court said:

> Where it is the Police Department which initiates a proceeding to retire an officer against his will and for a disability which is alleged to be unrelated to his official service, the evidence of such lack of connection should clearly preponderate and be substan-

> tial and persuasuve. Absent a record of which this can be said, the Department may be said to have failed to carry the burden fairly to be assigned to it under the statute. * * *

Crucial to the circuit court's decision was the fact—not present in either of hte instant cases—that theoriginal head injury occurred in the performance of duty. Also emphasized was a concession by the medical witness (upon whose testimony the Board relied for its finding that the headaches were not service-connected) that the possibility of retiree's condition stemming from the earlier concussion could not be ruled out. In short, all that the court held was that where a claimant makes a showing of a service incurred injury, the opposing side must then offer evidence disproving the logical inference that the ensuing disability was the long term result of such injury.

The opinion also discloses that the court interpreted only the first subsection of §4-527, for it pointed out (122 U.S. App. D.C. 3, 350, F.2d at 786, n.1) that the second subsection, with its requirement of a showing of aggravation caused by official duties, was not enacted until five days after the Commissioners had rejected Blohm's appeal. Yet it is the second subsection which we are asked to construe here.

The facts in *Wingo* more closely resemble those in the cases at bar, for there the Retirement Board was also dealing with a problem of mental disorder in contradistinction to a physical injury. In remanding an administrative order adverse to claimant, the court characterized its *Blohm* doctrine as providing an involuntary retiree with "presumptions of line-of-duty disability." Petitioners here rely heavily on this opinion to support their contention that the burden of proof is on respondents. In the absence of any explicit indication to the contrary, however; we conclude that the court in *Wingo*, like the court in *Blohm*, meant to restrict itself to the first subsection of 4-527. To do otherwise would bring the decision in *Wingo* into conflict with the language of the statute.

In *Wingo*, moreover, one of the factors attributed by claimant to his disabling emotional condition was the shooting and killing of a miscreant. It was conceded that this event, which might well have had lasting traumatic consequences, occurred in the officer's performance of duty. Thus the record in *Wingo* contrasts sharply with the factors asserted as aggravations of pre-existing mental conditions in the instant cases—emotional resentments to such normal incidents as reprimands, assignments to riot duty, policy decisions of superior officers on prosecution, and the like. We think it was within the competence of the Retirement Board to conclude that emotional outbursts occasioned by such matters were merely symptoms of a disease rather than products of aggravating causes.

It is also important to note that unlike retirement cases which have been reviewed by the federal courts of this jurisdiction, petitioners are before us under the provisions of the District of Columbia Administrative Procedure Act of 1968, Pub.L. 90-614, § 2, 82 Stat. 1204, D.C. Code 1967, §§ 1-1501 to 1-1510 (Supp. IV, 1971). The provisions for judicial review in this statute, which was not in effect when the *Blohm* and *Wingo* decisions were handed down, make it clear that when agency findings are assailed on evidentiary grounds, as petitioners have done in these cases, the test is whether the challenged findings are supported by "substantial" evidence, rather than by a clear preponderance" of evidence.[8]

In No. 5634, the Board's conclusion was based on a subsidiary finding that there were "no incidents or duty related circumstances during his service which would cause or aggravate [Johnson's] disabling condition"; and in No. 5635 that "the evidence clearly and persuasively established the lack of any connection between Officer Paxton's disability and his official service". As the record reveals that neither finding, nor the final conclusions, are unsupported by substantial evidence, we affirm.

[8] D.C. Code 1967, § 1-1510(3) (E) (Supp. IV, 1971).

We have considered petitioners' other contentions but discover in them no basis for modifying or setting aside the agency orders.

Affirmed.

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**BRIEF FOR RESPONDENT IN OPPOSITION**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-872

JACK I. JOHNSON

and

HERBERT W. PAXTON, JR.,
*Petitioners,*

v.

BOARD OF APPEALS AND REVIEW,
*Respondent.*

On Petition For A Writ Of Certiorari
To The District Of Columbia
Court Of Appeals

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On Petition For A Writ Of Certiorari
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## BRIEF FOR RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Did not petitioners' failure to file a petition for a writ of certiorari within 90 days after the entry of the judgment below deprive the Court of jurisdiction to entertain the petition?

2. Should this Court exercise its jurisdiction to review by writ of certiorari a decision involving the construction of statutes, of purely local application and significance,

relating to police and firemen retirement procedures and standards of judicial review of decisions of District of Columbia administrative agencies?

## COUNTER-STATEMENT OF THE CASE

Petitioners, former members of the United States Park Police, after hearings before the District of Columbia Police and Firemen's Retirement and Relief Board [1] (hereinafter "the Retirement Board"), were ordered retired, pursuant to D. C. Code, 1967, § 4-526, for non-service-connected disability. Contending that they were entitled to retirement, pursuant to D. C. Code, 1967, § 4-527, for service-connected disability, petitioners appealed to the District of Columbia Board of Appeals and Review,[2] which sustained the action of the Retirement Board. Petitioners then appealed the orders of the Board of Appeals and Review to the District of Columbia Court of Appeals pursuant to the provisions of the District of Columbia Administrative Procedure Act, D. C. Code, Supp. IV, 1971, § 1-1501 et seq. That court, on October 6, 1971, affirmed the orders of the Board of Appeals and Review. (A. 1a, 10a.)

At the proceedings before the Retirement Board and the Board of Appeals and Review, it was undisputed that both petitioners were mentally unfit for police duty. Petitioner Johnson's condition was characterized as a "passive aggressive personality with paranoid overtones"; petitioner Paxton's condition was described as "severe neurosis with

[1] The District of Columbia Police and Firemen's Retirement and Relief Board is an agency of the District of Columbia government created by executive order of the Commissioner of the District of Columbia. See Organization Order No. 12; D. C. Code, Supp. IV, 1971, Title 1, Administration, Appendix, p. 75.

[2] The District of Columbia Board of Appeals and Review is an administrative review board established by executive order of the Commissioner of the District of Columbia. See Organization Order No. 112, D. C. Code, Supp. IV, 1971, Title 1, Administration, Appendix, p. 87.

features of tensions, anxiety and depression" (A. 6a). Neither petitioner contended below that his basic mental disorder was incurred in the performance of duty. Rather, they contended that their police duty aggravated their mental disorders to such an extent that they could no longer perform duty (A. 6a). In affirming the orders of the Retirement Board and the Board of Appeals and Review, the District of Columbia Court of Appeals stated:

> "* * * We think it was within the competence of the Retirement Board to conclude that * * * emotional resentments to such normal incidents as reprimands, assignments to riot duty, policy decisions of superior officers on prosecution, and the like * * * were merely symptoms of a disease rather than products of aggravating causes." (A. 9a.)

Citing the District of Columbia Administrative Procedure Act, D. C. Code, Supp. IV, 1971, § 1-1501 et seq., the court further ruled that the applicable standard of review of decisions of the Retirement Board and the Board of Appeals and Review is not whether one party or the other had sustained its burden of proof, but whether there is substantial evidence in the record supporting the administrative ruling. Finding that there was such evidence in the records of the administrative proceedings, the court affirmed. (A. 9a.)

## REASONS WHY THE WRIT SHOULD BE DENIED

### The Court lacks jurisdiction to entertain the petition because it was not timely filed.

The Court does not have jurisdiction to entertain the petition for writ of certiorari filed herein because petitioners have not complied with the statutory command requiring them to apply for a writ of certiorari "...within ninety

days after the entry of ... judgment . . ." See 28 U. S. C. § 2101(c) and cf. *Schacht* v. *United States*, 398 U. S. 58, 64 (1970). The judgments below were entered on October 6, 1971 (A. 1a).[3] The petition for writ of certiorari, however, was not filed until Wednesday, January 5, 1972, which was the *ninety-first* day after entry of judgment.

On October 29, 1971, petitioners did file in the court below a motion for leave to file; time having expired,[4] and for an extension of time within which to file, a petition for rehearing or rehearing *en banc*. The motion was denied. It is well settled that the filing of such a motion, when it is denied, cannot operate to extend the time for petitioning this Court for a writ of certiorari. *Morse* v. *United States*, 270 U. S. 151 (1926); *Gypsy Oil Company* v. *Escoe*, 275 U. S. 498 (1927); *Bowman* v. *Loperena*, 311 U. S. 262, 266 (1940).

**Assuming the Court has jurisdiction, petitioners have failed to present any substantial federal question warranting review on writ of certiorari.**

Contrary to the command of subparagraph (h) of paragraph 1 of the Court's Rule 23, the petition for a writ of certiorari does not contain "[a] direct and concise argument amplifying the reasons relied on for the allowance of the writ." Indeed, petitioners nowhere indicate which, if any, of the "special and important reasons" set forth in Rule 19 they believe justify the granting of the petition. Rather, the petition is directed to what petitioners con-

[3] Rule 36 of the Rules of the District of Columbia Court of Appeals provides, in pertinent part:

> "(a) *Preparation and Entry.* The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment immediately following receipt of the opinion of the court . . ."

[4] Rule 40(a) of the Rules of the District of Columbia Court of Appeals provides, in pertinent part:

> ". . . A petition for rehearing or rehearing in banc may be filed within fourteen days after entry of judgment unless the time is shortened or enlarged by order . . ."

ceived to be the merits of issues presented to the court below and unanimously resolved against them.

The record does not disclose any ground for review conceivably falling within the standards and considerations governing review on writ of certiorari prescribed by Rule 19 of the Rules of this Court. These cases involve nothing more than the construction of District of Columbia statutes, of purely local application and significance, relating to police and firemen retirement procedures and to standards of judicial review of decisions of District of Columbia administrative agencies.

The Court has made it clear on many occasions that, where, as here, it is confronted with a petition for a writ of certiorari involving nothing more than a matter of purely local significance, it will not, absent a clear showing of egregious error, exercise its jurisdiction. *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285 (1935); *District of Columbia* v. *Pace*, 320 U. S. 698, 702 (1944); *Busby* v. *Electric Utilities Union*, 323 U. S. 72, 74-75 (1944); *Fisher* v. *United States*, 328 U. S. 463, 476-477 (1946); *Griffin* v. *United States*, 336 U. S. 704, 717-718 (1949), rehearing denied, 337 U. S. 921 (1949). There has been no showing of egregious error here.

In declining to hold that, in the circumstances of these cases, D. C. Code, 1967, § 4-527(2), imposes upon the government the burden of proving a lack of connection between petitioners' disability and the performance of duty, the court relied upon the plain language of the statute that a claimant is entitled to be retired at the higher rate only if his injury or disease "[is] *shown* to have been aggravated by the performance of duty *to such an extent* that the member is permanently disabled for the performance of duty * * *" (A. 7a).

In contending that the court below erred in this regard, petitioners rely on a statement in a House Report on the bill, which, when enacted, was codified as D. C. Code, 1967, § 4-527(2), which they construe as indicating an intention

that the government was to bear the burden of proof in cases such as this. See H. R. Rept. No. 892, 87th Cong., 1st Sess. 1 (1961). Yet the Senate Report, while otherwise quite similar to the House Report, omits any reference to burden of proof. See S. Rept. No. 2271, 87th Cong., 2nd Sess. (1962). In view of the clear language in the statute, it can hardly be said that the District of Columbia Court of Appeals committed egregious error in interpreting the statute as it did. See *Davidson* v. *Gardner*, 370 F. 2d 803, 828 (6th Cir., 1967); *Abell* v. *Spencer*, 96 U. S App. D. C. 268, 225 F. 2d 568 (1955); and 2 Sutherland, *Statutory Construction*, § 5005 (3rd ed., 1943).

Petitioners further contend that the ruling of the court below is in conflict with the rulings of the United States Court of Appeals for the District of Columbia Circuit in *Blohm* v. *Tobriner*, 122 U. S. App. D. C. 2, 350 F. 2d 785 (1965), and in *Wingo* v. *Washington*, 129 U. S. App. D. C. 410, 395 F. 2d 633 (1968). However, the court's opinion in the *Blohm* case could not have been applicable to subsection 2 of D. C. Code, 1967, § 4-527, because the police officer involved in that case was retired before that subsection was added to the statute (A. 8a). And in *Wingo* v. *Washington*, *supra*, the court neither identified the subsection of the statute under which the appellant therein sought to be retired nor confronted the problem of the different language used in the two subsections. Moreover, the only *holding* in *Wingo* was that the administrative findings were insufficiently articulated and were not, therefore, susceptible of intelligent review. Thus, the court's statement regarding "presumptions of line-of-duty disability" (129 U. S. App. D. C. at 412, 395 F. 2d at 365) is, at best, dicta.

In any event, the test spoken of by the court in *Blohm* and *Wingo*, that evidence of lack of connection between disability and performance of duty "should clearly preponderate and be substantial and persuasive" (see *Wingo* v. *Washington*, 129 U. S. App. D. C. at 412, 395 F. 2d at 635),

has been legislatively overruled by the District of Columbia Administrative Procedure Act, D. C. Code, Supp. IV, 1971, § 1-1501 et seq. The Act supersedes "any * * * procedure to the extent of any conflict therewith" (D. C. Code, Supp. IV, 1971, § 1-1501), and provides that in reviewing agency decisions on evidentiary grounds the test is whether the administrative ruling is "supported by substantial evidence in the record of the proceedings before the court" (D. C. Code, Supp. IV, 1971, § 1-1510).

In no sense then can this case be viewed as presenting a question of a magnitude sufficient to warrant the exercise of this Court's jurisdiction to review on writ of certiorari, assuming such jurisdiction exists.

## CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for writ of certiorari should be dismissed or, in the alternative, denied.

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